No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Exclusionary Rule is applicable to magazines purchased by an undercover police officer prior to any possible illegality in the later warrantless arrest of the seller and retrieval of the purchase money?

2. Whether Respondent's warrantless arrest shortly after his sale of the magazines, without any prior judicial determination of obscenity, was constitutional?

3. Whether it is appropriate under the Double Jeopardy Clause for an appellate court to determine that the State's evidence will be insufficient upon retrial simply because it has held that certain evidence was inadmissible, and thus for the court to order that the charge be dismissed?

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutory Provisions

Rules

Miscellaneous

CONTENTS OF APPENDIX

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OPINION BELOW

The opinion of the Court of Special Appeals of Maryland in Macon v. State, is reported at 57 Md. App. 705, 471 A.2d 1090, cert. denied, State v. Macon, 300 Md. 795, 481 A.2d 240 (1984).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Court of Appeals of Maryland denied the Petition for Writ of Certiorari to the Court of Special Appeals on September 14, 1984. The Petition for Writ of Certiorari was filed in this Court on November 14, 1984.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

(full text in appendix)

United States Constitution

- Amendment I
- Amendment IV
- Amendment V
- Amendment XIV

Annotated Code of Maryland (1982 Repl.Vol.)

- Article 27 - Crimes and Punishment
  - Section 417
  - Section 418
  - Section 424
  - Section 425

Maryland Rules of Procedure

- Currently in effect:
  - Rule 4-211 (b)(2)
  - Rule 4-212 (f)(1)
  - Rule 4-213 (a)
  - Rule 4-216 (a), (c), (d), (g)

In effect on May 6, 1981:

- Maryland District Rule 720a, h1
- Maryland District Rule 721a, f
- Maryland District Rule 723a, b4

STATEMENT OF THE CASE

During the months of April and May, 1981, the Prince George's County Police Department Vice-Criminal Intelligence Section investigated complaints that several bookstores were selling obscene material (e.g. M2. 17, M2. 56).[1] Baxter Macon, Respondent, was a sales clerk at the Silver News, Inc., 2488 Chillum Road, Hyattsville, Maryland, where, on May 6, 1981, at about 7:20 p.m. he was arrested for distribution of obscene material based on his sale of two magazines to a police detective a few minutes earlier (J.A. 33-34). The circumstances of the

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[1] The transcripts appear at R. 124 and are designated as follows: Motions Hearings: "M1" - September 1, 1981, "M2" - September 2, 1981, "M3" - September 15, 1981, "M4" - September 16, 1981; Trial: "T." - September 16, 17, 18, 21, 1981.

investigation, the arrests of Respondent and others, the purchases of the allegedly obscene material, and the retrieval of some of the purchase money were the subject of a consolidated hearing on motions to dismiss and motions to suppress filed by several defendants involved in cases arising from the investigation.

The general procedure utilized by the police was to have an officer in civilian clothes go to one of the adult bookstores, browse through it and purchase an item depicting explicit sexual conduct (J.A. 43, M2. 50). At times the police used bills whose serial numbers had been recorded (e.g. M2. 19-20). The item was then examined in its entirety by the purchasing officer and other officers to determine whether it was probably obscene (e.g. M2. 21).

At the beginning of the investigation, the purchasing officer was instructed to apply for a statement of charges/arrest warrant before a Disrict Court Commissioner (M2. 60-62). Those warrants obtained prior to May 6, 1981 were held until that

date, when they were all served in an effort to reduce the possibility of the suspects fleeing.[2] In part because of the difficulty in identifying the clerks involved (from license checks on automobiles, and/or surveillance) and because the investigation was coming to an end, instructions were given later to arrest the clerks immediately to facilitate their identification

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2 The supervising officer, Sgt. MacDonald testified that it was decided at the beginning of the investigation not to make any arrests until the investigation was complete (M3.105).

Det. Sweitzer testified that all arrest warrants were served on May 6, 1981 and that no arrests at all had been made before then. He explained:

> "We wished to investigate the complaint in its entirety as well as we could and after one month we had gone about as far as we could go and we were at a stage where we had a number of arrest warrants to be served and a limited number of man-power to serve them, so we cleared the investigation at that time."

Simultaneous arrests also reduced the possibility of flight. The warrantless arrests occurred at "around" the time the arrest warrants were served, also to minimize the danger that the clerks would disappear (M2.123-24).

and to minimize the danger that the particular clerk would disappear prior to arrest.[3] On some of the immediate arrests, the purchase money was seized as evidence. On one of those occasions the change made by the clerk was returned, upon his request (M3. 52).

Mr. Macon's arrest came toward the end of the investigation. At about 7:00 in the evening of May 6, 1981, Detective Ray Evans went to Silver News, where he browsed for fifteen minutes or so. At trial, the evidence revealed that the store windows were covered with paper to a point above eye-level for a normal sized person, so that passersby on the outside could not see in. Magazines were displayed on the

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3 For instance, defendant Ball was arrested without a warrant by Det. Husk who had "only seen Mr. Ball behind the counter selling products to the general public twice. I didn't know where Mr. Ball lived. We had a very tough time getting a return on his tag on the vehicle that he was driving so we couldn't find out the current address on it. So, in order to make sure we had Mr. Ball at that time, to make sure we could effect the arrest, we did it as a misdemeanor committed in our presence with Mr. Ball." (M2. 64-65). Another defendant was arrested by Det. Husk also because of identification problems (M2. 79-80).

walls almost from ceiling to floor. All of the magazine covers contained depictions of sexual acts; most were wrapped in plastic. On the right side of the store, empty packages of eight millimeter movies were displayed. In the back of the store there was a movie room where customers could view for a fee the movies that were offered for sale (T. 79-81).

Detective Evans selected two magazines wrapped in plastic (J.A. 34). The wrapper was unsealed so he took the magazines out and examined them from cover to cover (T. 82-83, 86). He took them to Mr. Macon, who stood behind the cash register on a platform (J.A. 37). Evans paid for the magazines with a fifty dollar bill with a recorded serial number and received nearly thirty-eight dollars in change. He took the magazines to two other officers who were waiting in a car in the parking lot. Detectives Roland B. Sweitzer, Jr. and John L. Fickinger examined the magazines along with Evans (T. 114). They concluded that the photographs met the criteria they had used

for prior obscenity warrants and arrests (J.A. 35). The three then went in to the bookstore, arrested Mr. Macon and retrieved the fifty dollar bill. He did not request - and the police did not offer - the return of the change (J.A. 45).

Pursuant to Maryland procedure, Mr. Macon was charged with distributing obscenity in violation of Article 27, §418 of the Maryland Code by a Statement of Charges in the District Court and released on his own recognizance within two to three hours of his arrest on the evening of May 6, 1981. (R. 5-10) A preliminary inquiry was set in District Court for May 12, 1981. On that date, he demanded a jury trial and the case was transferred to the Circuit Court for Prince George's County. It was initially scheduled for arraignment on May 22, 1981 and for trial on August 31, 1981. After a pre-trial conference, Macon filed both a Motion to Dismiss (R. 21-24) (J.A. 5) and a Motion to Suppress (R. 25-26) (J.A. 3), followed by a Memorandum in Support (R. 30-55) (J.A. 10). The

State responded (R. 66-71) (J.A. 25). A hearing on both motions was ultimately held on September 1, 2 and 15, 1981. Both were denied. A motion for reconsideration was heard on September 16, 1981. It, too, was denied.

Respondent's motions to dismiss and to suppress were based, in part, on the fact that a neutral judicial officer did not view the magazines prior to Respondent's arrest. He argued that he was entitled to dismissal of the charging document because his warrantless arrest constituted an illegal prior restraint on his right to freedom of expression. He further asserted that when the police officer came into possession of the magazines by misrepresenting an exchange of money for goods he committed theft by "false pretense" under Maryland Annotated Code, Article 27, §341. Therefore, Respondent argued that the retention of the magazine by the police as a result

of the sham sale constituted an illegal seizure without a warrant.[4]

In denying both motions, Judge Woods rejected Respondent's argument, finding instead, as the State had argued, that the bargained for exchange of magazines for money was not a seizure and that no prior judicial determination of obscenity was needed for the arrest of Respondent without a warrant for distribution of obscene matter (J.A. 49).

The magazines were admitted at Respondent's jury trial (St. Ex. 1 and 2, T. 77, 88). The only additional objection to their admission was based on Respondent's lack of opportunity to have a voir dire examination of Detective Evans on the chain of custody (T. 85-88). The State did not introduce the

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4 Respondent specifically disavowed any intent to move to suppress the fifty dollar bill (M3. 22) which was, in any event, not used as evidence at the jury trial. That particular bill had apparently been returned to police funds by the time of the hearing, although the police had retained the change given to Det. Evans as potential evidence (J.A. 45).

fifty dollar bill. At the conclusion to the four day trial from September 16-21, 1981, in which he asserted an entrapment defense, Respondent was found guilty of distribution of obscene matter (T. 515). After waiving his right to speedy sentencing on December 2, 1981, Respondent was sentenced on January 25, 1983 to pay a fine of five hundred dollars, plus seventy-five dollars in court costs (R. 3).

Respondent filed a timely appeal to the Court of Special Appeals. On March 2, 1984, the Court of Special Appeals reversed Respondent's conviction in a reported opinion by Judge John J. Bishop, Jr. (A.P.C. 1), holding that the warrantless arrest of Respondent was illegal. The court held that there was insufficient probable cause to support the warrantless arrest since the police had not taken the magazines to a judicial officer for a determination of obscenity. Notwithstanding the fact that the police officer had purchased the magazines from Respondent prior to the arrest, the Court of Special Appeals condemned this

voluntary exchange of goods for money as a "constructive seizure", based on the improper subjective intent of the officers to retrieve the purchase money later, and ordered that the magazines should have been suppressed to punish such police misconduct. Not only was Respondent's conviction reversed, but the Court of Special Appeals ordered that the indictment be dismissed. The State of Maryland's Motion for Reconsideration was denied. The State then filed a Petition for Writ of Certiorari in the Court of Appeals of Maryland which was denied on September 14, 1984.

SUMMARY OF ARGUMENT

I. The special constraints imposed by the First Amendment do not apply unless there is a Fourth Amendment search or seizure. The purchase of a magazine, even by an undercover police officer who later arrests the seller without a warrant and retrieves the purchase money, is neither a search nor a seizure.

The Exclusionary Rule does not apply to evidence obtained prior to any alleged illegality.

II. Ordinarily the normal components of due process protect a defendant's rights and a police officer may determine probable cause to arrest without a warrant. Only if those procedures fail to prevent a prior restraint on free expression of presumptively protected material does an otherwise reasonable seizure become unreasonable. In Maryland, the prompt judicial determination of probable cause for anyone arrested without a warrant and the bona fide law enforcement rationale for making the warrantless arrest here prevented any improper interference with First Amendment interests.

III. The Double Jeopardy bar of Burks v. United States, 437 U.S. 1 (1978), is limited to appellate reversal for evidentiary insufficiency. Reversal based on the improper admission of evidence is not a "termination of jeopardy" that would prohibit a new jeopardy. It was inappropriate for the appellate court

to determine that the remaining evidence, discounting the evidence it found inadmissible, will be insufficient at a new trial.

ARGUMENT

Introduction

At issue in this case is when - if at all - the sale of magazines in a commercial setting can trigger the Exclusionary Rule of the Fourth Amendment. Obviously annoyed that the Prince George's County Police took back the purchase money when they arrested Respondent a few minutes after the transaction (and, worse, did not return the change), the Court of Special Appeals of Maryland first held that the magazines were obtained through a "constructive seizure" and should not have been admitted at Respondent's trial for distribution of obscene material. Secondly, the court held that the warrantless arrest, prior to a determination by a judicial officer that the magazines were probably

obscene, was unconstitutional. Finally, finding that the evidence would be insufficient to convict without the magazines, the court ordered that the charges be dismissed.

The State of Maryland challenges all three aspects of the court's ruling, arguing that the Fourth Amendment, even when augmented with the special protections under the First Amendment, does not compel this result. Under proper analysis, the actions of the police were completely proper. More importantly, however, even if the warrantless arrest and retrieval of the money were improper, those actions do not convert retrospectively an otherwise unremarkable purchase into an unconstitutional seizure. That totally unwarranted extension of the Exclusionary Rule is a thinly veiled effort to punish the police for later transgressions and "bad faith". It clearly requires reversal.

I.

THE EXCLUSIONARY RULE DOES NOT REACH MAGAZINES PURCHASED PRIOR TO ANY POSSIBLE ILLEGALITY IN THE LATER WARRANTLESS ARREST OF THE SELLER AND RETRIEVAL OF THE PURCHASE MONEY.

There are, no doubt, "special constraints upon searches for and seizures of material arguably protected by the First Amendment." Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n.5 (1979). Given as examples there were Heller v. New York, 413 U.S. 483 (1973) (First Amendment safeguards adequate to validate New York procedure for warranted seizure of single copy of film for bona fide evidentiary purpose) and Marcus v. Search Warrant, 367 U.S. 717, 731-32 (1961) (invalidating Missouri warrant procedure for obscenity cases as applied on due process grounds).[5] In each of those instances however, there was, first and

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5 Marcus was decided the same day as Mapp v. Ohio, 367 U.S. 643 (1961), but was based on due process rather than Fourth Amendment Exclusionary Rule grounds.

foremost, a search or seizure that implicated the Fourth Amendment. As characterized more recently in Zurcher v. Stanford Daily, 436 U.S. 547, 564-65 (1978), "the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search." Those cases are precisely the ones relied on by Respondent, by the Maryland Court of Special Appeals, and by the few other courts whose opinions are cited for support:

> "Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' Stanford v. Texas, [379 U.S. 477] supra, at 485, 13 L.Ed.2d 431, 85 S.Ct. 506. 'A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.' Roaden v. Kentucky, 413 U.S. 496, 501, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973). Hence, in Stanford v. Texas, the Court invalidated a warrant authorizing the search of a private home for all books, records, and other materials relating to the Communist Party, on the ground that whether or not the warrant would have been sufficient in other contexts, it authorized the searchers to rummage among and make judgments about books and papers and was the functional

equivalent of a general warrant, one of the principal targets of the Fourth Amendment. Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

Similarly, where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to 'focus searchingly on the question of obscenity.' Marcus v. Search Warrant, supra, at 732, 6 L.Ed.2d 1127, 81 S.Ct. 1708; A Quantity of Books v. Kansas, 378 U.S. 205, 210 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (1968); Roaden v. Kentucky, supra, at 502, 37 L.Ed.2d 757, 93 S.Ct. 2796; Heller v. New York, 413 U.S. 483, 489, 37 L.Ed.2d 745, 93 S.Ct. 2789 (1973)."

The "special constraints" imposed by the First Amendment, are applicable, then, only if there is a Fourth Amendment interest involved. Completely lacking in the opinion below is any proper analysis of that Fourth Amendment threshold. When that analysis is made, the conclusion rapidly appears that the government action here in obtaining the magazines

was neither a search nor a seizure under the Fourth Amendment.

A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. United States v. Karo, 468 U.S. __, 104 S.Ct. 3296, 3302, 82 L.Ed.2d 530, 539 (1984); United States v. Jacobsen, 466 U.S. ___, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 94 (1984). Respondent claims no such expectation and none would be reasonable. The commercial establishment invited in all members of the public to purchase the magazines. The officer did no more.[6] Lewis v. United States, 385 U.S. 206 (1966). Respondent, as a sales clerk standing ready at a cash register, had no privacy expectation whatsoever in the wares he sold to the public. Not even the court below could construe the actions as a search.

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6 This public access in fact makes particularization of complaints in the obscenity cases more feasible. Marcus, 367 U.S. at 735 n.27.

A seizure occurs when there is some meaningful interference with an individual's possessory interests in the property, United States v. Karo, 468 U.S. at __, 104 S.Ct. at 3302, 82 L.Ed.2d at 540; United States v. Jacobsen, 466 U.S. at __, 104 S.Ct. at 1656, 80 L.Ed.2d at 94. Here, Respondent voluntarily transferred any possessory interest he had in the magazines to the purchaser. As long as the clerk received the necessary tariff, he was happy to part with the possession of the magazines - permanently. Compare United States v. Van Leeuwen, 397 U.S. 249 (1970), where the defendant retained a Fourth Amendment interest in packages he mailed to others. That interest was found not to have been invaded by their temporary detention. In this case Respondent's possessory interest was irrevocably severed when he accepted the purchase money. He - or Silver News - then obtained an interest in the money. The only interference with any possessory right, and hence, the only seizure, was of the fifty dollar bill used to effect the purchase.

Respondent has never moved to suppress it nor has he or any other party including Silver News, Inc., sought compensation for its seizure. Whatever rights anyone may have to the money, however, do not affect Respondent's possessory rights in the magazines under the Fourth Amendment.

If the magazines were obtained without any search or any seizure, the Fourth Amendment predicate is lacking, and there is no need to apply the heightened scrutiny necessary for the protection of First Amendment interests.

Ignoring this clear analysis, the Maryland Court of Special Appeals strained to contort the facts of this case into a Fourth Amendment context. Its view was that from the later illegal police conduct in arresting Respondent without a warrant and retrieving the purchase money, one must infer that the police - in bad faith - intended from the outset to pursue an unconstitutional course of action, which in turn converted the purchase into an invalid "constructive

seizure" under the Fourth Amendment to the United States Constitution. The remedy for that unlawful seizure was suppression of the magazines.[7] That view cannot withstand scrutiny.

There are two necessary components to the court's analysis. First, the finding that the police lacked a bona fide ("good faith") intent to part with the money - make a purchase - at the time they acquired the magazines is a prerequisite to calling the transaction a constructive seizure. Next, the belief that the police action was tainted by a pre-conceived, and unalterable, notion that the magazines would be obscene, regardless of their actual content, is necessary to find a First Amendment restraint. Neither assumption is supported by the record.

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[7] The Court of Special Appeals drew heavily from State v. Furuyama, 637 P.2d 1095 (Haw. 1981), a decision described as taking "a substantial and questionable step" beyond Roaden in 2 W. LaFave, Search and Seizure §6.7(e) (1978, 1984 supp.).

The police were investigating complaints about the distribution of obscenity in the adult bookstores. They had made purchases at the Silver News on other occasions and had initiated criminal prosecutions. They did record the serial number of a fifty dollar bill prior to the sale. However, when the officer went in to the Silver News at about 7:00 p.m. on May 6, 1981, selected two magazines, took them to the clerk, and paid for them, there was no inevitability to what followed. The purchasing officer did not decide on his own that he had witnessed the unlawful distribution of obscene material. Rather, he took the magazines to be examined by two other officers who collectively concluded that there was probable cause to believe that the material was, in fact, obscene. Then the decision was made to go back in to the store immediately and to arrest Respondent without a warrant. Retrieval of the identifiable fifty dollar bill accompanied the arrest. The officers could have concluded that these particular magazines were not

probably obscene under Miller v. California, 413 U.S. 15 (1973). The officers could have decided to take their information to a commissioner and seek an arrest warrant for the clerk. The fact that they did neither, and instead arrested Respondent without a warrant does not convert the purchase into a constitutional violation justifying the full wrath of the Court of Special Appeals.

The examination and purchase of potentially obscene material by officers posing as ordinary customers has received more than tacit approval in prior decisions of this Court. In Marcus, 367 U.S. at 733 n.26, the English practice that began with the purchase of suspected obscenity by a police officer was characterized as placing a greater restraint on seizure power than required by the Due Process Clause. The events ultimately condemned in Lo-Ji Sales, Inc. v. New York, supra, also began with an unremarkable purchase of two reels of film, 442 U.S. at 321. That transaction was so benign that the "clerk

arrested at petitioner's store entered a guilty plea to a charge of disorderly conduct for selling the two films to the State Police investigator. He did not appeal." 442 U.S. at 324 n.4. Similarly, the prosecution in Smith v. United States, 431 U.S. 291, 293 (1977), was based on materials mailed by Smith "at the written request of postal inspectors using fictitious names." Finally, in Heller, supra, 413 U.S. at 485, both police officers and a judge purchased tickets and viewed a film suspected of being obscene. These cases demonstrate that undercover police work is a useful and accepted tool in obscenity investigations, just as it is in narcotics cases, Lewis, supra.

That some illegality may follow a legitimate purchase cannot change its nature as conduct beyond the reach of the Fourth Amendment. The Supreme Court of Minnesota reached precisely that conclusion in State v. Welke, 216 N.W.2d 641, 644 (Minn. 1974), where the purchase of three magazines was followed by a warrantless arrest, the retrieval of the "buy

money," a two and one-half hour search, and the seizure of a large number of other magazines. The court refused to suppress the three magazines purchased:

> "Whatever the subjective intent of the two officers may have been, however, the transaction by which they obtained the magazines in exchange for money cannot be considered a search or seizure. Purchases by undercover agents from willing sellers, in places far more private than a bookstore, were held in Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), not to violate the Fourth Amendment."

Other courts agree. For example, Missouri appellate courts upheld use of the magazines in State v. Cox, 619 S.W.2d 794, 797 (Mo.App. 1981), cert. denied, 455 U.S. 976 (1982), and State v. Perry, 567 S.W.2d 380, 382 (Mo.App. 1978). In both cases, the police confiscated the purchase money when the defendants were arrested warrantlessly just after the sales. See also Hunt v. State, 601 P.2d 464, 466-67 (Okl.Cr.App. 1979) (even subsequent illegal arrest would not affect use of purchased film).

Perhaps more egregious than its distorted view of the nature of the Fourth Amendment itself was the Court of Special Appeals' extension of the Exclusionary Rule backward in time, to exclude evidence obtained prior to any alleged illegality. Last term, the Court emphasized the proper role of the Exclusionary Rule when, in Nix v. Williams, __ U.S. __, 104 S.Ct. 2501, 2508-10, 81 L.Ed.2d 377, 386-87 (1984), the "inevitable discovery" doctrine was formally recognized:

> "The core rationale consistently advanced by this Court for extending the Exclusionary Rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.
>
> By contrast, the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of

> some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation."

An overriding principle emerged from these doctrines:

> "It is clear that the cases implementing the Exclusionary Rule 'begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity.' United States v. Crews, 445 U.S. 463, 471, 63 L.Ed.2d 537, 100 S.Ct. 1244 (1980) (emphasis added)." Id. at 387.

Furthermore, the Court laid to rest any notion that police "bad faith" triggers the Exclusionary Rule:

> "The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a worse position than they would have been in if no unlawful conduct has transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach." Id. at 388.

An even greater reason to resist extending the Exclusionary Rule exists here — the magazines were both discovered and lodged firmly in police custody before any arguable improper police actions occurred. The entire premise of the Exclusionary Rule is lacking. The challenged evidence was not in any sense the product of illegal governmental activity.[8]

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[8] There were two items of potential evidence obtained following the arguably improper police actions. The immediate warrantless arrest of Respondent made his identification easier and the retrieval of the fifty dollar bill made it available as evidence at trial. As to the first, the Court recently reaffirmed the principle that:

> "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. See Gerstein v. Pugh, 420 U.S. 103, 119, 43 L.Ed.2d 54, 95 S.Ct.854 (1975). Frisbie v. Collins, 342 U.S. 519, 522, 96 L.Ed.2d 541, 72 S.Ct. 509 (1952). United States ex rel Bilokumsky v. Tod [263 U.S. 149,] 158, 68 L.Ed.2d 221, 44 S.Ct. 54." Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. ___, 104 S.Ct. 3479, 3485, 82 L.Ed.2d 778 (1984).

Cont'd.

Lacking completely any Fourth Amendment intrusion, and with no sound basis to invoke the sanction of the Exclusionary Rule, the trial court properly denied Respondent's motion to suppress the magazines. The action of the Court of Special Appeals in reversing that determination must itself be reversed.

II.

THE WARRANTLESS ARREST OF RESPONDENT SHORTLY AFTER HIS SALE OF THE MAGAZINES, WITHOUT ANY PRIOR JUDICIAL DETERMINATION OF OBSCENITY, WAS CONSTITUTIONAL.

In addition to finding an illegal "constructive seizure" in the purchase of the magazines, the lower court found that the warrantless arrest of Respondent was unconstitutional. It held that "a necessary predicate to seizure of the person, as well as the

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Nor, of course, would an illegal arrest defeat jurisdiction over Respondent, United States v. Crews, 445 U.S. 463, 474 and n.20 (1980). As to the second item, Respondent never moved to suppress the fifty dollar bill, and it was not introduced at trial.

allegedly obscene matter he distributes, is a prior judicial determination that there is probable cause to believe the matter is obscene." (A.P.C. 10). Petitioner submits that this is an unnecessary and unwarranted extension of the special protection afforded materials presumptively protected by the First Amendment.

A warrantless arrest, if properly based on probable cause, is constitutional. Gerstein v. Pugh, 420 U.S. 103, 113 (1975). In United States v. Watson, 423 U.S. 411, 418 (1976), the Court concluded that:

> "[t]he cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest."

It is also well recognized that police officers, through training and experience, may acquire an expertise not possessed by laymen and that probable cause determinations are made in light of that expertise. 1 W. LaFave, Search and Seizure, §3.2(c) (1978) (citing

inter alia, United States v. Ortiz, 422 U.S. 891 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968); and Johnson v. United States, 333 U.S. 10 (1948)). According to Respondent, however, a warrantless obscenity arrest is improper because a police officer is incapable of determining that a particular item probably meets the test for obscenity under Miller v. California, supra, 413 U.S. at 24-25 (1973).[9] That argument is specious, particularly in light of the Court's observation in Miller that the presentation of "expert" testimony on community standards by an experienced police officer "was certainly not constitutional error." 413 U.S. at 31

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9 a) Whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest;

b) Whether the work depicts or describes sexual conduct, in a patently offensive way, and

c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

n.12. One capable of contributing expert knowledge on part "a" of the test is certainly capable of assessing the probability that part "a" as well as parts "b" and "c" are present.

The more significant aspect of the question presented is whether the Respondent's arrest "brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition," and thus, whether it constituted a forbidden "prior restraint of the right of expression" making it "unreasonable" under the Fourth Amendment. Roaden v. Kentucky, 413 U.S. 496, 504 (1973). All of the Court's prior pronouncements in this area have focused on the seizure of books, magazines, or films and have not dealt directly with the seizure (arrest) of the distributor. When analyzed under those precedents, however, it becomes clear that a warrantless arrest, without more, does not offend the First Amendment. The strict requirements applicable to the seizure of the materials themselves provide ample protection from improper prior restraints.

On other occasions, courts have been asked to invalidate arrests based on grounds that would have invalidated a seizure. They have, however, distinguished between seizures of allegedly obscene material and arrests of alleged distributors. In Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288, 296-97 (S.D.N.Y. 1969) (3 judge court), aff'd, 397 U.S. 98 (1970), individuals had claimed a right to an adversary hearing prior to arrest, just as was then thought to be required prior to a seizure. The court acknowledged that "arrests and prosecutions are likely to deter activities of the kind against which they are directed," but nevertheless concluded that traditional protections of the criminal process were sufficient, and possibly preferred, safeguards for First Amendment rights. Accord Adler v. Pomerleau, 313 F.Supp. 277, 286 (D.Md. 1970) (3 judge court). Those cases involved arrests pursuant to warrants or even after indictment, and thus did not present the issue of warrantless arrests, as the present case does. The rationale is sound, however, and should prevail here.

The major case relied on by Respondent and the Court of Special Appeals did conclude that warrantless obscenity arrests are improper. In Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1359 (5th Cir. 1980), the Court of Appeals determined that no police officer could ascertain probable obscenity without consulting a judicial officer and, particularly, that the untrained and uninformed officers involved in that case were incapable of making a reasonable determination. Furthermore, the official course of action included widespread warrantless arrests of sales clerks at convenience, food, and drug stores, as well as at adult book stores. The conduct resulted in retailers removing the magazines from the shelves and was found to be a calculated scheme of bad faith harassment, resulting in an informal prior restraint on purveyors of the magazines in the entire Atlanta metropolitan area. The campaign was orchestrated by a prosecutor who publicly promised that other arrests would be made and claimed that his "plan" was working

because no further violations were found. The Fifth Circuit invalidated the plan based on Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

Bantam Books dealt with a Rhode Island Commission that deliberately set out to intimidate book and magazine wholesale distributors and retailers and to cause them to withdraw certain publications from public circulation. It succeeded in achieving its goal by sending notices to distributors that listed the objectionable material, thanked them for cooperating in removing that material, and advised them that non-compliance might result in prosecution. This extreme example of "informal censorship" was found to be an invalid system of prior restraint and was enjoined.

Where, however, there is no intent to intimidate and no real danger of chilling free expression, other courts have declined to find an invalid prior restraint in a warrantless arrest. Most of these cases, like the one before the Court, involved limited use of warrantless arrests and arose in the context of a

motion to suppress or dismiss in a criminal case, rather than in a civil proceeding to enjoin a particular prosecutorial abuse. See, e.g., State v. Flynn, 519 S.W.2d 10, 12 (Mo. 1975); Wood v. State, 240 S.E.2d 743, 744 (Ga.App. 1977); Price v. State, 579 S.W.2d 492, 495 (Tex.Cr.App. 1979). A prior restraint is obviously effected when an item is removed or prohibited from public distribution, as by a confiscatory seizure. It is also possible that a course of official conduct may have a substantial chilling effect meriting injunctive relief. However, the mere use of warrantless arrests, not part of a deliberate, on-going plan to intimidate, does not constitute a prior restraint.

As noted above, the fact of any prosecution may dissuade others from engaging in similar conduct. That alone is not "prior restraint." The Court has already accepted the proposition that the Miller standard is sufficiently definite to "provide fair notice to a dealer in such materials [depicting or

describing patently offensive hard core sexual conduct] that his public and commercial activities may bring prosecution." Miller, 413 U.S. at 27. That distribution of obscenity is illegal does not exert an impermissible chill on First Amendment rights. The unstated assumption is that normal due process protections serve to protect an accused at every step of that prosecution. The special concern of the First Amendment to guard against prior restraints is only triggered when the normal safeguards are inadequate.

For example, in Roaden, it was emphasized that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." 413 U.S. at 501. The inquiry here is whether a warrantless arrest based on trained and experienced officers' evaluation of probable cause to believe that a crime was committed, reasonable generally under the Fourth Amendment, becomes unreasonable because the crime is distribution of obscene material and because the defendant is the cashier in a bookstore.

In Maryland, the arrest of an individual without a warrant prompts an almost immediate appearance before a District Court Commissioner who must release a defendant on unrestricted personal recognizance if there is no probable cause to believe the defendant committed an offense. Rules 4-212(f) and 4-216(c). Even with a probable cause determination, a defendant is entitled to be released on personal recognizance unless the commissioner determines that more restrictions are needed to insure appearance for trial.[10] Rule 4-216(d). Any defendant who remains in custody twenty-four hours after a commissioner determines the conditions of release is immediately brought before a district court judge, who must redetermine conditions of release. Rule 4-216(g). In short, a warrantless arrest results in a very restricted period of custody prior to determination by

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10 Respondent was released on his own recognizance by the commissioner less than three hours after the arrest (R. 5-10).

a judicial officer that there is in fact probable cause to charge the defendant with a crime. Such a minor intrusion, justified here in part by the difficulty in identifying the clerks and the possibility that service of the other arrest warrants might scare them off, was reasonable. In Roaden, the Court recognized that there may be "exigent circumstances in which police action literally must be 'now or never' to preserve evidence of the crime," permitting action without prior judicial evaluation even when the seizure of films is involved. 413 U.S. at 505. And in Heller, the Court recognized the difference between seizures of films for the purpose of destruction or blocking exhibition and seizures for the bona fide purpose of obtaining evidence for prosecution if unaccompanied by an actual restraint on continuing exhibition of the film. 413 U.S. at 492. Thus, the law enforcement need to rely on the normally permitted methods of initiating prosecution, including warrantless arrests, should be reaffirmed.

The warrantless arrest here was not part of a concerted effort merely to harass, or to intimdate the stores into ceasing operations. Indeed, the police worked completely in secret until they thought they had obtained enough evidence to bring the cases to court. Then they endeavored to make all arrests in a short period of time precisely to avoid any chilling effect on the conduct of other clerks. There was no intent - formal or informal - to impose a prior restraint on the operation of the adult bookstores.[11]

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[11] Respondent attempts to magnify the importance of the fact that his arrest caused the closure of Silver News, Inc. for some unidentified period of time on the evening of May 6, 1981. There was no evidence to that effect presented at the motions hearing; only at trial was an officer asked what happened after the arrest. (Under Maryland procedure, review of a suppression motion is limited to evidence presented at the pre-trial hearing, Pharr v. State, 36 Md. App. 615, 618, 375 A.2d 1129, 1131 (1977); Haslup v. State, 30 Md. App. 230, 241, 351 A.2d 181, 187 (1976).) Elsewhere in the motions hearing, it appears that other clerks had been arrested earlier in the day at Silver News, obviously not preventing its operation by Respondent. In any event, it was not the intent of the police to stop distribution of similar material simply by arresting the clerk.

The warrantless arrest here was not shown to interrupt in any meaningful way the public's access to protected material. Respondent's arrest was but the first step in his prosecution for the unlawful distribution of obscene material. The normal requirements of due process afforded any defendant were ample to protect his rights. A warrantless arrest, without more, does not "bring to an abrupt halt an orderly and presumptively legitimate distribution or exhibition," is not an invalid "prior restraint of the right of expression," and is not "unreasonable" under the Fourth Amendment.

III.

THE APPELLATE COURT'S DISMISSAL OF THE CHARGE WAS NOT APPROPRIATE EVEN IF THE MAGAZINES WERE IMPROPERLY ADMITTED IN EVIDENCE AND WITHOUT THEM THE STATE'S EVIDENCE WILL BE INSUFFICIENT.

As its coup de grace, the Court of Special Appeals ordered that the charges be dismissed, citing

Burks v. United States, 437 U.S. 1 (1978), instead of ordering that the case be remanded for a new trial as is ordinarily the remedy for trial error. This too, was wrong and requires correction.[12]

In Burks, of course, the Court held that the double jeopardy clause of the Fifth Amendment bars retrial when an appellate court reverses a conviction for evidentiary insufficiency. Expressly left open in the companion case of Greene v. Massey, 437 U.S. 19, 26 n.9 (1978), was the proper resolution of the double jeopardy concern when, after discounting improperly admitted evidence, the remaining evidence is insufficient. More recent opinions explaining the

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12 Respondent sought dismissal on different grounds, and, as shown in his Brief in Opposition to the Petition for Writ of Certiorari, mistakenly believes that the Court of Special Appeals adopted his theory. Respondent's theory is that he could not commit the crime of distributing obscene material unless at the time he sold the material, it had already been determined to be obscene, thus rendering the evidence insufficient. The court's specific language in citing to Burks, however, indicates that it did not find the evidence insufficient on that ground.

Burks decision and analyzing its rationale make clear that the double jeopardy bar should not be extended to cases where the error causing reversal concerns the admission of evidence, no matter how thin the remaining evidence looks to the reviewing court.

In Justices of Boston Municipal Court v. Lydon, 466 U.S. __, 104 S.Ct. 1805, 1814, 80 L.Ed.2d 311, 325 (1984), the Court focused on the concept of the termination of jeopardy. Unless some identifiable event occurs that constutites the termination of first jeopardy, there can be no impermissible second jeopardy. Burks involved the "significance" of an already existing appellate decision that the evidence presented at trial was insufficient. It was found not to control the very different issue of whether a defendant tried in a two tiered trial system is entitled to a determination of the sufficiency of the evidence at the first tier bench trial before undergoing the second tier jury trial. The Court held that the defendant has no such right. Similarly, in Richardson v. United States,

468 U.S. ___, 104 S.Ct. 3081, 3085, 82 L.Ed.2d 242 (1984), the Court refused to extend Burks to give a defendant, before retrial, a right to a review of the sufficiency of the evidence presented at the first trial that ended in a mistrial due to a hung jury. In both cases, adopting the defendant's position would have required a court to undertake an additional step in the process not otherwise performed. In both cases the Court held that the double jeopardy clause does not require a court to review the evidentiary sufficiency issue.

Similar policy considerations control the issue here. There was no prior determination that the evidence produced at trial was insufficient. The only necessary appellate determination was that trial error occurred when certain evidence was admitted. The appellate court's further conclusion that the State's evidence will be insufficient without the inadmissible evidence involved a review not otherwise performed. It should not be the function of the reviewing court to

decide whether the prosecution can muster other evidence to prove its case, however unlikely that might appear to be. Appellate courts ordinarily sit to review decisions of lower courts, or to determine questions that should or could have been resolved below. Allowing an appellate court to determine sufficiency of the evidence after it has eliminated some of the proof adds a new dimension to the role of the appellate court, that of original arbiter. It would no longer be reviewing an action of the trial court, or passing on the validity of past events. Rather, it would be determining for the first time that the prosecution will be unable to do something in the future. Such a drastic rearrangement of the traditional roles in the criminal justice system is unwarranted when no double jeopardy principle justifies it.

The practical implications of allowing sufficiency rulings on appeal are serious. A prosecutor, with multiple means to prove an essential

element, who is fearful that an appellate court may later find one such piece of evidence inadmissible, would be well advised to offer all available evidence, no matter how redundant, to guard against the kind of result in this case. The cost in terms of trial time alone would be massive. A prosecutor might find it expeditious to offer duplicative evidence even of dubious admissibility to stave off an unfavorable sufficiency ruling, thereby causing reversals that might otherwise not occur.

On the other hand, if the appellate ruling on the admissibility of evidence does leave the prosecutor's case fatally deficient, there will probably be no retrial anyway. The scarcity of resources (to say nothing of professional integrity and pride) discourages prosecutors from trying unmakable cases. In the rare event that an over-zealous prosecutor insists on continuing a case where proof of an essential element may well be lacking, a trial court can ask for a proffer and dismiss if there really is no substitute for the

suppressed evidence. At worst, the defendant must wait until the close of the prosecutor's case for the trial judge to grant a motion for judgment of acquittal. While that defendant will have been subjected to a partial new trial, that is a small hardship when compared to the alternatives.

Ironically, one of the best articulations of the reasons for not applying Burks to this situation appears in the Maryland Court of Appeals' decision in State v. Boone, 284 Md. 1, 12-18, 393 A.2d 1361, 1367-70 (1978) (that court denied review in this case). The court noted how carefully this Court in Burks had distinguished reversal for trial error from reversal for evidentiary insufficiency. The error in the latter situation means that the case should have resulted in entry of an acquittal, an absolutely final disposition. There is no similar conclusion available when trial error causes reversal. Further, it stated:

> "The prosecution, we believe, in proving its case is entitled to rely upon the correctness of the rulings of the court and proceed accordingly. If

> the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to consider every ruling by the court on the evidence to be erroneous and marshall and offer every bit of relevant and competent evidence. The practical consequences of this would seriously affect the orderly administration of justice, if for no other reason, because of the time which would be required to prepare for trial and try the case. Furthermore, if retrial were precluded because discounting erroneously admitted evidence results in evidentiary insufficiency, there would be no opportunity to correct an error by the court as distinguished from the mistaken belief by the prosecution that it had proved its case. It is in this context, we think, that Burks gave as examples of trial error not invoking the Double Jeopardy Clause with regard to retrial, the 'incorrect receipt or rejection of evidence', along with 'incorrect instructions' and 'prosecutorial misconduct.' Id. [Burks, 437 U.S. at 16]" 284 Md. at 16-17, 393 A.2d at 1369-70.

It may be easy in a case such as the one before the Court to conclude that evidence erroneously

admitted at the first trial is indeed indispensible to successful prosecution. That is not always the case, however, and appellate courts should not undertake to sift the weak cases from the stronger ones. Retrial after appellate reversal is the general rule. The Double Jeopardy bar of Burks is a narrow exception to that rule and does not apply here.

CONCLUSION

Both the First and the Fourth Amendments protect important rights and deserve zealous enforcement. When, however, the police do not search, or seize, or restrain free expression in the constitutional sense, there is no occasion for judicial invocation of the Exclusionary Rule. The Court of Special Appeals of Maryland improperly concluded that the purchase of the obscene magazines was followed by flagrant police misconduct in the warrantless arrest of Respondent and retrieval of the purchase money. The State of Maryland requests that the judgment be reversed.

Respectfully submitted,

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APPENDIX

United States Constitution:

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV:

SECTION I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland (1982 Repl.Vol.):

Article 27
OBSCENE MATTER

§417. Definitions.

As used in this subtitle,

(1) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(2) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(3) 'Distribute' means to transfer possession of, whether with or without consideration.

(4) 'Knowingly' means having knowledge of the character and content of the subject matter.

§418. Sending or bringing into State for sale or distribution; publishing, etc., within State.

Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

§424. Penalty.

Violation of this subtitle is punishable upon conviction by fine of not to exceed $1,000 or by imprisonment not to exceed one year, or both unless otherwise provided. Any subsequent conviction of a violation of this subtitle is punishable by a fine of not to exceed $5,000 or by imprisonment not to exceed three years, or both unless otherwise provided.

§425. Destruction of obscene matter.

Upon the conviction of the accused, the court, when the conviction becomes final, may order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the State's attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

Maryland Rules of Procedure
(Currently in effect)

Rule 4-211. Filing of Charging Document.

* * *

(b) Statement of Charges. -

* * *

(2) After Arrest. - When a defendant is arrested without a warrant, the officer who has custody of the defendant shall forthwith cause a statement of charges to be filed against the defendant in the District Court. At the same time or as soon thereafter as is practicable, the officer shall file an affidavit containing facts showing probable cause that the defendant committed the offense charged.

Rule 4-212. Issuance, Service, and Execution of Summons or Warrant.

* * *

(f) Procedure - When Defendant in Custody. -

(1) Same Offense. - When a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest. When a charging document is filed in the District Court for the offense for which the defendant is already in custody a warrant or summons need not issue. A copy of the charging document shall be served on the defendant promptly after it is filed, and a return shall be made as for a warrant. When a charging document is filed in the circuit court for an offense for which the defendant is already in custody, a warrant issued pursuant to section (d)(2) of this Rule may be lodged as a detainer

for the continued detention of the defendant under the jurisdiction of the court in which the charging document is filed. Unless otherwise ordered pursuant to Rule 4-216, the defendant remains subject to conditions of pretrial release imposed by the District Court.

Rule 4-213. Initial Appearance of Defendant.

(a) In District Court Following Arrest. - When a defendant appears before a judicial officer of the District Court pursuant to an arrest, the judicial officer shall proceed as follows:

(1) Advice of Charges. - The judicial officer shall inform the defendant of each offense with which the defendant is charged and shall provide the defendant with a copy of the charging document if the defendant does not already have one and one is then available. If one is not then available, the defendant shall be furnished with a copy as soon as possible.

(2) Advice of Right to Counsel. - The judicial officer shall require the defendant to read the notice to defendant required to be printed on charging documents in accordance with Rule 4-201(a), or shall read the notice to a defendant who is unable for any reason to do so. A copy of the notice shall be furnished to a defendant who has not received a copy of the charging document.

(3) Pretrial Release Determination. - The judicial officer shall determine the defendant's eligibility for pretrial release pursuant to Rule 4-216.

(4) Advice of Preliminary Hearing. - When a defendant has been charged with a felony that is not within the jurisdiction of the District Court and has not been indicted, the judicial officer shall advise the defendant of the right to have a preliminary hearing by

a request made then or within ten days thereafter and that failure to make a timely request will result in the waiver of a preliminary hearing. If the defendant then requests a preliminary hearing, the judicial officer may either set its date and time or notify the defendant that the clerk will do so.

(5) Certification by Judicial Officer. - The judicial officer shall certify compliance with this section in writing.

(6) Transfer of Papers by Clerk. - As soon as practicable after the initial appearance by the defendant, the judicial officer shall file all papers with the clerk of the District Court or shall direct that they be forwarded to the clerk of the circuit court if the charging document is filed there.

Rule 4-216. Pretrial Release.

(a) When Available. - Unless ineligible for pretrial release under Code, Article 27, §616 1/2, (1) a defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment is entitled to be released before verdict or pending a new trial in conformity with this Rule, and (2) a defendant charged with an offense for which the maximum penalty is death or life imprisonment may, in the discretion of the court, be released before verdict or pending a new trial in conformity with this Rule.

* * *

(c) Probable Cause Determination. - A defendant arrested without a warrant shall be released on personal recognizance under terms that do not significantly restrain the defendant's liberty unless the judicial officer determines that there is probable cause to believe that the defendant committed an offense.

(d) Conditions of Release. - A defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment shall be released before verdict or pending a new trial on personal recognizance unless the judicial officer determines that that condition of release will not reasonably ensure the appearance of the defendant as required. Upon determining to release a defendant charged with an offense for which the maximum penalty is death or life imprisonment or to refuse to release a defendant charged with a lesser offense on personal recognizance the judicial officer shall state the reasons in writing or on the record and shall impose the first of the following conditions of release which will reasonably ensure the appearance of the defendant as required, or, if no single condition is sufficient, the judicial officer shall impose on the defendant that combination of the following conditions which is not onerous but which reasonably ensure the defendant's appearance as required:

(1) Committing the defendant to the custody of a designated person or organization agreeing to supervise the defendant and assist in ensuring the defendant's appearance in court;

(2) Placing the defendant under the supervision of a probation officer or other appropriate public official;

(3) Subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

(4) Requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer including any of the following:

(A) without collateral security,

(B) with collateral security of the kind specified in Rule 4-217(e)(1) as equal in value to the greater of the $25.00 or 10% of the full penalty amount, or a larger percentage as may be fixed by the judicial officer,

(C) with collateral security of the kind specified in Rule 4-217(e)(1) equal in value to the full penalty amount,

(D) with the obligation of a corporation which is an insurer or other surety in the full penalty amount;

(5) Subjecting the defendant to any other condition reasonably necessary to ensure the appearance of the defendant as required.

* * *

(g) Review of Commissioner's Pretrial Release Order. - A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court. The District Court shall review the commissioner's pretrial release determination and take appropriate action thereon. If the defendant will remain in custody after the review, the District Court shall set forth in writing or on the record the reasons for the continued detention.

Maryland District Rules
(in effect May 6, 1981)

Rule 720. Issuance, Service and Execution of Charging Document.

a. Statement of Charges After Arrest.

When a defendant is arrested without a warrant, the officer who has custody of the defendant shall forthwith cause a statement of charges to be filed against the defendant. For the purpose of considering pretrial release of the defendant, the officer shall at the same time, or as soon thereafter as is practicable, file a verified statement of facts showing probable cause that the defendant committed the offense charged.

* * *

h. When Defendant is in Custody.

1. For Same Offense.

A warrant or summons need not issue upon the filing of a charging document if the defendant is in custody only for the same offense at the time the charging document is filed. A copy of the charging document shall be served on the defendant as soon as possible after it is filed, and the peace officer who served it shall make a prompt return of service to the court which shows the date, time and place of service.

Rule 721. Pretrial Release.

a. When Available.

Before conviction or pending a new trial, a defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment is entitled to be released pending trial,

subject to the provisions of this Rule. A defendant charged with an offense for which the maximum penalty is death or life imprisonment may be released pending trial in the discretion of the court. This Rule does not appely to defendants ineligible for pretrial release under Article 27, section 616 1/2(c), of the Maryland Code.

* * *

f. Review of Pretrial Release Order.

If pretrial release is denied by a commissioner, or if for any reason the defendant remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule, the defendant shall be brought immediately before a court if the court is then in session, or if not, at the next session of the court that follows the denial of pretrial release of the expiration of the 24 hours. The court shall review the commissioner's pretrial release determination and shall take appropriate action thereon. If the defendant will continue to remain in custody after the review, the court shall set forth in writing or on the record the reasons for requiring the continued detention.

Rule 723. Initial Appearance.

a. After Arrest.

A defendant who is detained pursuant to an arrest shall be taken before a judicial officer without unnecessary delay and in no event later than 24 hours after arrest. A charging document shall be filed promptly after arrest if not already filed.

b. Procedure.

At the initial appearance of the defendant, the judicial officer shall proceed as provided in this section.

* * *

4. Probable Cause Determination.

When a defendant has been arrested without a warrant, the judicial officer may not impose conditions of pretrial release which impose a significant restraint on the liberty of the defendant until the judicial officer determines that there is probable cause to believe that the defendant committed an offense. If the judicial officer does not find probable cause, the defendant shall be released on his own recognizance under terms which do not significantly restrain his liberty.